

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)

America's Carriers Telecommunication)
Association ("ACTA"))

Petition for Declaratory Ruling, Special Relief)
and Institution of Rulemaking)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RM-8775

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OPPOSITION OF THE BUSINESS SOFTWARE ALLIANCE

The Business Software Alliance ("BSA"), by its undersigned counsel and pursuant to Section 1.405 of the Commission's Rules, hereby submits the following opposition to the Petition for Declaratory Ruling, Special Relief and Institution of Rulemaking of America's Carriers Telecommunication Association ("ACTA Petition"). ACTA's Petition requests, *inter alia*, that the Commission regulate certain software publishers as "telecommunications carriers."¹

Not only do software publishers fall outside of the Telecommunications Act of 1996's ("1996 Act") definition of telecommunications carriers, but also Section 509 of the 1996 Act explicitly states that it is the policy of the United States not to subject "the Internet and other interactive computer services" to federal and state regulation.² Moreover, the pro-competitive and deregulatory goals of the 1996 Act dictate that the Commission not regulate the software industry -- an industry that flourishes today in an extremely competitive market, providing consumers with a

¹ See Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking of the America's Carriers Telecommunications Association, filed March 4, 1996.

² Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56 (1996).

diverse array of products at very competitive prices. Therefore, in order not to exceed its statutory authority, and in the interest of maintaining continued growth, innovation, and competition in the software industry, the Commission should deny ACTA's Petition and refrain from regulating software publishers in any manner. Such regulation is not only outside the limits of the Commission's delegated authority but also is unnecessary and inconsistent with the objectives and goals of the 1996 Act.

I. STATEMENT OF INTEREST

The Business Software Alliance ("BSA") promotes the continued growth of the software industry through its international public policy, education, and enforcement programs in more than 60 countries throughout North America, Europe, Asia, and Latin America. The members of BSA's Policy Council include the leading U.S. publishers of computer software, including Adobe Systems, Inc.; Apple Computer, Inc.; Autodesk, Inc.; Bentley Systems, Inc.; Computer Associates International, Inc.; Digital Equipment Corporation; International Business Machines Corporation; Intel Corporation; Lotus Development Corporation; Microsoft Corporation; Novell, Inc.; Symantec Corporation; Sybase, Inc.; and The Santa Cruz Operation.

Characterized by relentless innovation, thriving competition, diversity, private investment and the absence of regulation, the software industry has become an undisputed success story. Significantly, since its inception a little over two decades ago, the software industry has been allowed to grow in an environment unfettered by regulation. This has enabled the software industry to concentrate on the innovation that has fundamentally transformed the American economy by creating software tools that significantly contribute to the growth and prosperity of companies in

other sectors of the U.S. and global economies. Indeed, the development of new and innovative software products is directly responsible for opening up new markets, lowering barriers to entry, and enabling large and small companies in all industries to become more efficient, productive and creative in their work.

Similarly, the industry's continuous innovations have allowed software and computing companies to provide individual consumers with advanced hardware and software at very reasonable prices. For example, sophisticated computers can now be offered for less than \$1,000, hundreds of complex multipurpose computer software programs are now available for under \$100, and the vast majority of software sells for less than \$500. The relatively low cost of software and computers has served to put advanced technology within the reach of the average consumer.

ACTA's Petition raises significant regulatory issues regarding the Commission's role with respect to the software industry by asserting the erroneous view that software publishers should be regulated as telecommunications carriers. Accordingly, BSA's members, as the leading U.S. publishers of computer software, have a vital interest in the Commission's determination of whether software publishers should remain non-regulated entities under the FCC's rules and the Communications Act, as amended. As set forth below, and in the interest of continued industry growth and leadership, BSA strongly believes that subjecting software publishers to regulation would both exceed the Commission's regulatory jurisdiction and significantly impede innovation, growth and development in an otherwise competitive and prosperous market that well serves the public's interest.

II. THE COMPUTER SOFTWARE INDUSTRY IS A MODEL OF COMPETITION AND INNOVATION, AND SHOULD REMAIN UNREGULATED

The computer software industry thrives in a highly competitive market that has never been regulated by the Commission or any other regulatory body. As a result, a successful, interconnected, open, voluntary, innovative, consensus-based, super-efficient, market-driven industry and marketplace have developed. Free from government standards, regulatory barriers, and artificial regulatory frameworks, the software industry has provided enormous value to end-users and, accordingly, these users have responded favorably by increasingly investing in computer software products and services. As a result, today there are literally thousands of thriving firms that are involved in various aspects of the software industry.

Technological advances in software and computing are marked by leap-frogging change: success depends on displacing existing technologies with a new generation of products over very short periods of time. Regulating this industry would be a major departure and a potentially disastrous destabilizing force in a now well-functioning market. The facts outlined below confirm that the American software industry is flourishing:²

- (1) Revenue in the computer software industry more than doubled between 1987 and 1994, and has increased nearly 20 percent in real terms since 1992. In 1994, revenue reached more than \$74 billion.
- (2) U.S. software employment has grown at an annual rate of 9.6 percent since 1987. In comparison, jobs in the rest of the economy have increased at only 1.6 percent per year. Total employment in the industrial segments that define the industry reached 478,000 in 1994, up from 251,200 in 1987.

² Stephen E. Simek and Kent W. Mikkelsen, Economists Inc., *A 20th Century Business Success Story: U.S. Software Industry Trends, 1987-1994* at 5.

- (3) From 1987 to 1994, the software industry grew 117 percent in real terms, while the remainder of the economy grew only 17 percent.
- (4) U.S.-developed software dominates world markets. U.S. firms hold 75 percent of the global market for prepackaged software.
- (5) Recently-released employment figures indicate employment increased again in 1995 to 532,700, 11.5 percent above the 1994 level.

To subject the innovative and competitive computer software market to regulation would directly contravene the legislative intent of the 1996 Act. Congress plainly stated that its purpose in passing the 1996 Act was to establish

a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and service to all Americans by opening all telecommunications markets to competition.^{4/}

Accordingly, it would be counter to public policy and legislative intent for the Commission suddenly to impose unnecessary regulation on software publishers, and such action would be particularly inappropriate at a time when Congress has just enacted federal legislation specifically aimed at *deregulating* the communications industry, not regulating it.^{5/}

^{4/} S. Conf. Rep. No. 104-230, 104th Cong. 2d. Sess. 1 (1996) (emphasis supplied).

^{5/} The 1996 Act clearly “take[s] down the barriers of local and long distance and cable company, satellite, computer, software entry into any business [these companies] want to get into.” See Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98. ¶ 37 (Released April 19, 1996) (citing 142 Cong. Rec. H1151) (Feb 1, 1996). Accordingly, to the extent that the Commission had already begun to deregulate certain services (*e.g.* enhanced services, equipment manufacture, etc.), BSA submits that, in the absence of specific mention in the 1996 Act, Congress implicitly supported such measures.

The success of the software industry is due to competition, innovation and the favorable response of markets and investors to an *unregulated* environment. Applying outdated regulatory models to the highly competitive and innovative software industry could have disastrous consequences. Accordingly, the challenge for government in this instance is to ensure that nothing interferes with the industry's growth, including regulatory intervention that might "fossilize" technology or innovation at yesterday's levels or otherwise impede the ongoing development that has kept the software industry so vibrantly competitive and served the interests of consumers so well.

III. NEITHER COMPUTER SOFTWARE PUBLISHERS NOR INTERNET SERVICE PROVIDERS ARE SUBJECT TO REGULATION UNDER THE 1996 ACT AND NEITHER MAY BE REGULATED BY THE FEDERAL COMMUNICATIONS COMMISSION

A. Neither Computer Software Publishers Nor Internet Service Providers are Subject to Regulation Under the Telecommunications Act of 1996

The ACTA Petition asserts that under the 1996 Act, certain software publishers must be considered to be "telecommunications carriers" subject to the Commission's jurisdiction.⁶⁷ BSA strongly believes that ACTA's position is not only misguided but also cannot be supported under the plain language of the 1996 Act.

Under Section 3 of the 1996 Act, the following definitional framework was created:

(41) The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications. . .

⁶⁷ See ACTA Petition at i.

(48) The term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

(49) The term ‘telecommunications carrier’ means any provider of telecommunications services . . . A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . .

(51) The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

In order to be classified as a telecommunications carrier under the 1996 Act, software publishers would have to be engaged in the “provi[sion] of telecommunications services.” Accordingly, the software publisher would have to: (1) offer telecommunications; (2) for a fee; (3) directly to the public. As discussed below, software publishers do not provide telecommunications.

In order to be considered as offering “telecommunications,” a software publisher would have to: (1) *transmit* information “between or among points specified by the user,” (2) *transmit* information “of the user’s choosing,” and (3) *transmit* such information “without change in the form or content of the information as sent and received.” All three conditions must be satisfied for a service to be considered telecommunications.

Software publishers clearly do not offer “telecommunications” because, very simply, they do not engage in the *transmission* of information between or among points specified by the user. To the extent that a software product is an application that enhances utilization of the Internet or the public switched network, the customer must obtain the underlying transmission facilities from a carrier or service provider. Software publishers do not provide these connections. Accordingly,

because software publishers do not offer “telecommunications,” they cannot be considered as providing “telecommunications services” under the 1996 Act.

This conclusion is buttressed by a careful examination of other sections of the 1996 Act wherein Congress makes clear its intention not to regulate either software publishers or Internet service providers (“ISPs”) as either common carriers or telecommunications carriers. As noted previously, the 1996 Act defines “information service” as “the offering of a capability for *generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available* information via telecommunications . . .” (emphasis supplied). Furthermore, “access software” is defined in Section 230(e)(4) of the Communications Act as software “(including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following: (A) *filter, screen, allow, or disallow content*; (B) *pick, choose, analyze, or digest content; or transmit, receive, display, forward, cache, search, subset, organize, reorganize or translate content.*” (emphasis supplied). Accordingly, under Section 230(e)(2) of the Communications Act, any ISP or software publisher that falls within the definition of an “*information service, system or access software provider* that provides or enables computer access . . . *including specifically . . . access to the Internet*” must also be classified as an “interactive computer service.” This definition clearly places ISPs within the scope of “interactive computer services” since ISPs provide systems that enable computer access to the Internet. Congress clearly intended to exclude providers of “interactive computer services” from any FCC regulation of telecommunications carriers. Aside from the fact that these services clearly were omitted from the definition of “telecommunications services” in the 1996 Act, Congress also made special note of

their intent in the only section of the 1996 Act that deals directly with the Internet and other computer services -- Title V, Subtitle A, the Communications Decency Act.

In Title V of the 1996 Act, Congress amended the Communications Act of 1934 by adding Section 223(e)(6). This subsection extends limited authority to the FCC to describe blocking measures that providers of “interactive computer services” may offer to restrict access to obscene or harassing material over their networks. Congress, however, included within this subsection express language to prevent the FCC from expanding upon this narrow directive. Specifically, Congress warned the FCC that “[n]othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.” Congress noted its proscription again in the conference report to the 1996 Act stating: “This new subsection grants no further authority to the Commission over interactive computer services and should be narrowly construed.” Telecommunications Act of 1996, Report 104-458, 104th Cong., 2d Sess., January 31, 1996, p. 191.

During passage of the 1996 Act in the House of Representatives, Rep. Rick White stated on the House floor : “[W]e have to make sure that the FCC does not have a role in regulating the Internet.” Congressional Record, February 1, 1996, p. H1168. Accordingly, the express language of the 1996 Act and its accompanying legislative history together instruct the FCC that it has no authority to regulate software publishers or ISPs as common carriers or telecommunications carriers.

B. *Section 509 of the 1996 Act Clearly Sets Forth the Policy that the Internet and Other Interactive Computer Services be “Unfettered by Federal or State Regulation.”*

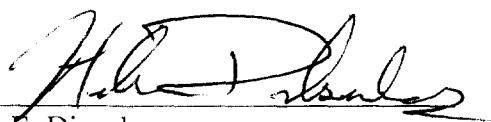
Reinforcing the view that the provision of interactive services utilizing software applications should not be regulated is that the recently enacted Telecommunications Act of 1996 clearly and explicitly states that the Internet and other interactive computer services should be free of federal and state regulation. Section 509 of the 1996 Act provides that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*” (emphasis added.) Thus, in the 1996 Act, Congress expresses a clear intent that the FCC and the State commissions refrain from regulating Internet and interactive computer services, including software.

IV. CONCLUSION

For the foregoing reasons, BSA urges the Commission to deny ACTA's Petition. Because software publishers do not transmit telecommunications, they cannot be regulated as "telecommunications carriers" under the 1996 Act. Section 509 and the pro-competitive and deregulatory goals of the 1996 Act mandate that the vibrant and free competitive software market remain "unfettered by Federal or State regulation." Thus, to regulate the highly competitive and innovative computer software industry would be both contrary to the express language as well as the policies and goals of the 1996 Act.

Respectfully submitted,

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